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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

REGINALD LEON MORRIS,

Defendant and Appellant.

B301794

(Los Angeles County
Super. Ct. No. A711491)

APPEAL from an order of the Superior Court of
Los Angeles County, Hilleri G. Merritt, Judge. Reversed.

Jonathan E. Demson, under appointment by the Court of
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief
Assistant Attorney General, Susan Sullivan Pithey, Assistant
Attorney General, Idan Ivri and Michael Katz, Deputy Attorneys
General, for Plaintiff and Respondent.

Petitioner and appellant Reginald Leon Morris challenges on appeal the trial court’s denial of his petition for resentencing under Penal Code section 1170.95,¹ which was enacted to implement changes in the murder laws made by Senate Bill No. 1437. (*People v. Lamoureux* (2019) 42 Cal.App.5th 241, 249.) “Prior to the enactment of Senate Bill No. 1437, . . . both the felony-murder rule and the natural and probable consequences doctrine provided theories under which a defendant could be found guilty of murder without proof of malice.” (*People v. Lee* (2020) 49 Cal.App.5th 254, 260, review granted July 15, 2020, S262459.) Senate Bill No. 1437 amended the law to “require that a principal act with express or implied malice and by amending section 189 to state that a person can only be liable for felony murder if (1) the ‘person was the actual killer’; (2) the person was an aider or abettor in the commission of murder in the first degree; or (3) the ‘person was a major participant in the underlying felony and acted with reckless indifference to human life.’” (*People v. Tarkington* (2020) 49 Cal.App.5th 892, 896 (*Tarkington*), review granted Aug. 12, 2020, S263219.)

Section 1170.95 affords a procedural vehicle for a petitioner to challenge retroactively a murder conviction that rests on a theory of murder no longer valid. If petitioner makes a prima facie showing that he or she is entitled to relief under the statute, then the trial court “shall issue an order to show cause.” (§ 1170.95, subd. (c).) At such a hearing, the prosecution has the burden to prove beyond a reasonable doubt that the petitioner is ineligible for resentencing, and both sides may rely on the record of conviction or offer new evidence. (*Id.*, subd. (d)(3).)

¹ All statutory citations are to the Penal Code.

Here, after appointing counsel for Morris, the trial court concluded that Morris had not established a prima facie showing of entitlement to relief and thus did not issue an order to show cause.

On appeal, the parties agree that Morris made a prima facie showing of entitlement to relief because taking all inferences in Morris's favor, the record of conviction does not demonstrate that Morris's conviction necessarily was based on a murder theory valid under current law. We thus reverse the trial court's order denying Morris's section 1170.95 petition, and order the trial court to issue an order to show cause and conduct a hearing pursuant to section 1170.95, subdivision (d).

BACKGROUND

1. *Conviction*

In October 1988, the People charged Morris with two counts of murder and alleged that, with respect to both counts, Morris personally used a firearm and was armed with a firearm. The People alleged that the murders were committed while Morris was committing a robbery and that Morris committed multiple murders. The People also charged Morris with robbery and alleged that he personally inflicted great bodily injury as well as firearm enhancements. Fifteen-year-old Levon Davis was Morris's accomplice. Davis testified at Morris's trial.² According to Davis, he and Morris planned and committed the robbery and murders together.

² The People prosecuted Davis in separate juvenile proceedings. We do not have a record of those proceedings.

Prior to trial, the trial court struck the robbery and multiple murder special circumstances allegations. During trial, the court granted Morris's section 1118.1 motion in part by striking allegations of personal use of a firearm with respect to all counts and striking the great bodily injury enhancements with respect to the robbery.

During trial, the trial court instructed jurors on numerous theories supporting a murder conviction. The court instructed jurors on aiding and abetting. The court instructed jurors that to find defendant committed murder, jurors had to find either the "killing was done with malice aforethought or occurred during the commission or attempted commission of robbery." The court instructed jurors on the difference between first and second degree murder indicating that felony murder and murder committed with premeditation and deliberation were first degree murder. The court also instructed jurors on second degree murder as "the unlawful killing of a human being with malice aforethought . . . but the evidence is insufficient to establish deliberation and premeditation." The trial court further instructed jurors that an aider and abettor is liable for the natural and probable consequences of the criminal act he knowingly and intentionally aided and abetted.

The prosecutor argued that the evidence showed murder based on malice and felony murder. The prosecutor told jurors that they could rely on either theory. The prosecutor argued that "an aider and abettor is someone who counsels, who helps, doesn't have to do the shooting himself." The prosecutor continued: "[T]here [are] two theories of murder here. . . . [T]he easiest of course is felony murder. In felony murder you don't need malice. You don't need premeditation, you don't need

deliberation.” The prosecutor also argued that Morris killed with malice aforethought and with premeditation and deliberation. The prosecution argued that Morris and Davis premeditated as they sat outside of a Domino’s Pizza (Domino’s) and that Morris demonstrated his intent to kill when he handed Davis the gun.

Jurors convicted Morris of two counts of first degree murder and one count of second degree robbery. Jurors found not true the allegation that Morris was armed with a firearm. The trial court sentenced Morris to two consecutive sentences of 25 years to life for the murders. The court stayed Morris’s three-year sentence for robbery.

2. *This Court Affirmed the Judgment*

This court affirmed the judgment.³ (*People v. Morris* (Jan. 30, 1992, B052590) [nonpub. opn.].) In its opinion, this court described the facts as follows:

“On August 20, 1988, Morris went to the Lakeview Terrace Domino’s Pizza store and talked to 15-year-old Levon Davis (who worked at Domino’s) about robbing the store.” Later, “Morris and Levon [Davis] bought some beer and talked about robbing Domino’s.” “Levon [Davis] drove home, took his father’s .38-caliber Smith & Wesson revolver, and then drove with Morris to Domino’s, parked across the street and waited for Sean Linn,

³ Although there is a split of authority whether the court may consider the record of conviction, this court has held that the trial court may consider the record of conviction in evaluating a petitioner’s prima facie showing under section 1170.95, subdivision (c.) (*People v. Lewis* (2020) 43 Cal.App.5th 1128, 1137–1138 (*Lewis*), review granted Mar. 18, 2020, S260598; but see *People v. Cooper* (2020) 54 Cal.App.5th 106, 125–126 (*Cooper*).)

the store's manager, to come out of the store with the day's bank deposit. Morris held the gun while he and Levon [Davis] drank beer. After waiting for about three hours, Levon [Davis] and Morris drove across the street and waited in Domino's parking lot for another hour."

Eventually Davis and Morris went inside the Domino's and Morris handed the gun to Davis. Davis shot Linn multiple times, "grabbed the money bag and walked toward the front of the store. Davis then shot another Domino's employee Freddie Zuniga " 'because he did not want to leave any witnesses.' " "Levon [Davis] stuck the money bag in his pocket, put the gun in his pants and walked outside" Levon's father later noticed that his gun contained six spent shells. Both Linn and Zuniga died of gunshot wounds.

This court described Morris's testimony at trial as follows: Morris testified that he was at Domino's with friends and that Davis joined them. "Later, Morris and his friends went to visit another friend and all of them drank beer for several hours. When everyone started to leave, Morris unsuccessfully tried to find a ride home and then started to walk. Morris saw a familiar jeep and he flagged it down. Levon [Davis] was driving and Morris asked for a ride. Levon [Davis] agreed, but said that he had to stop at his job on the way. [¶] According to Morris, when they arrived at Domino's . . . Morris remained in the lobby. Later, Morris went outside to urinate and when he started back toward the lobby Zuniga [an employee at Domino's] was mopping the floor. As Morris stood at the doorway talking to Zuniga, Morris heard loud noises that sounded like gunshots or trays dropping. Zuniga said he was going to see what was happening and walked into the kitchen area. As Zuniga walked away,

Morris turned to look at an approaching car and, when he turned back, he saw Levon [Davis] shoot Zuniga.”

This court noted Morris’s efforts to challenge Davis’s credibility. “Morris extensively cross-examined Levon [Davis] (filling over 200 pages of transcript) and effectively impeached Levon with evidence of his lies about the murders, his general propensity to lie, his anger at Morris for what Levon perceived to be threats against him and his family, and, finally, Levon’s admission of his involvement in the murders.”

3. *Petition for Resentencing*

On January 18, 2019, Morris filed a petition for resentencing. Morris alleged that he could not now be convicted of murder because of changes made to sections 188 and 189. Morris averred that “the record support[s] a conclusion that the jury based my conviction for first-degree murder on the illegal theory of ‘felony murder,’ in violation of” section 1170.95. Morris “assert[ed] that I am eligible for relief under section 1170.95, based on all the requirements of subdivision (a).” Morris requested counsel.

The People filed an informal opposition. The trial court appointed counsel for Morris. With the assistance of counsel, Morris filed a reply brief. In his reply, Morris’s counsel argued that the prosecution did not prove beyond a reasonable doubt that Morris either aided and abetted the murders of Linn and Zuniga or that Morris was a major participant in the robbery and acted with reckless indifference to human life. (§ 189, subd. (e).) For these reasons, Morris argued that he was eligible for resentencing and the trial court should issue an order to show cause and conduct a hearing pursuant to 1170.95, subdivision (d).

The trial court concluded that Morris had not demonstrated a prima facie case of entitlement to relief, and therefore denied Morris’s petition for resentencing. The trial court incorrectly assumed that felony murder was the “only theory given” to the jury. As described above, the jury instructions included multiple theories of murder. Based on its assumption that the prosecution pursued only a felony-murder theory at trial, the trial court concluded the record would have supported a conviction based on a currently valid theory.

DISCUSSION

Morris argues that the trial court erred in denying his petition for resentencing without “first issuing an order to show cause and holding an evidentiary hearing” (Boldface & capitalization omitted.) Morris further contends the trial court erred in “summarily” denying the petition merely by evaluating whether substantial evidence would support a theory other than felony murder. Respondent acknowledges that the trial court erred in not issuing an order to show cause and that we should remand this matter to the trial court to conduct an order to show cause hearing. Respondent contends that although the record would support the determination that Morris acted as a major participant with reckless indifference to human life, the record of conviction does not demonstrate *as a matter of law* that Morris acted as a major participant with reckless indifference to human life. We agree.

Courts of Appeal, including this court, have interpreted section 1170.95 to include multiple levels of trial court review. (*Lewis, supra*, 43 Cal.App.5th at pp. 1136–1138, review granted; *People v. Verdugo* (2020) 44 Cal.App.5th 320, 328 (*Verdugo*), review granted Mar. 18, 2020, S260493); *Tarkington, supra*,

49 Cal.App.5th at pp. 897–898, review granted; *People v. Drayton* (2020) 47 Cal.App.5th 965, 975 (*Drayton*); *People v. Offley* (2020) 48 Cal.App.5th 588, 596–597 (*Offley*), but see *Cooper, supra*, 54 Cal.App.5th 106, 121–123.)

Subdivision (b) of section 1170.95 describes an initial review to determine the facial sufficiency of the petition. (*Verdugo, supra*, 44 Cal.App.5th at p. 328, review granted.) To be facially sufficient, the petition must contain the petitioner's declaration setting forth that the petitioner is eligible for relief according to the criteria in subdivision (a),⁴ the case number and year of conviction, and whether the petitioner is requesting appointment of counsel. (§ 1170.95, subd. (b)(1).) If the petition is missing any of this information which “cannot be readily ascertained by the court, the court may deny the petition without prejudice” (*Id.*, subd. (b)(2).)

Section 1170.95, subdivision (c) then sets forth two levels of prima facie review. (*Verdugo, supra*, 44 Cal.App.5th at pp. 329–330, review granted.) Initially, without first appointing counsel, the trial court reviews the petition to determine if a petitioner “‘falls within the provisions’” of the statute. (*Id.* at p. 329; but see *Cooper, supra*, 54 Cal.App.5th at p. 112 [holding that counsel must be appointed at this stage of trial court

⁴ Section 1170.95, subdivision (a) lists the following conditions for resentencing: (1) A charging document was filed against the petitioner that “allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine.” (2) “The petitioner was convicted of first degree or second degree murder following a trial” or an accepted plea; and (3) “The petitioner could not be convicted of first or second degree murder because of changes to Section[s] 188 or 189” (§ 1170.95, subd. (a).)

review].) The trial court may consider the record of conviction to determine whether as a matter of law, the petitioner would be ineligible for resentencing. (*Lewis, supra*, 43 Cal.App.5th at pp. 1137–1138, review granted.) If the record of conviction does not establish the petitioner’s ineligibility for resentencing, evaluation of the petition proceeds to the second prima facie review, in which “the court must direct the prosecutor to file a response to the petition, permit the petitioner (through appointed counsel if requested) to file a reply and then determine, with the benefit of the parties’ briefing and analysis, whether the petitioner has made a prima facie showing he or she is entitled to relief.” (*Verdugo, supra*, at p. 330.) The trial court may not engage in factfinding. (*Drayton, supra*, 47 Cal.App.5th at p. 980.) As set forth earlier in this opinion, if petitioner has made these prima facie showings, the trial court must issue an order to show cause. (§ 1170.95, subd. (c).)

Here, Morris alleged that he was convicted under a felony-murder theory no longer valid because of Senate Bill No. 1437, and the record does not show as a matter of law, that jurors convicted him on a theory unaffected by the amendments in Senate Bill No. 1437. During Morris’s 1990 trial, the trial court instructed jurors on multiple theories of murder, including felony murder, which at that time, did not require proving that the defendant was a major participant acting with reckless indifference to human life. (*People v. Chun* (2009) 45 Cal.4th 1172, 1182 [under prior law felony murder supports a murder conviction without “further examining the defendant’s mental state”].) The prosecutor argued that jurors may rely on felony murder to convict Morris of murder. The record of conviction does not dispel the possibility that the jury may have convicted

Morris of felony murder if, for example, it believed Morris participated in the robbery of the Domino's store, without finding that he was a major participant showing reckless indifference to human life. In sum, the record of conviction does not establish as a matter of law, that Morris failed to make a prima facie case of entitlement to relief under section 1170.95.

At the order to show cause hearing, the trial court may review the entire record of conviction and any new evidence proffered by the parties to determine whether petitioner could be guilty under a currently valid theory of murder beyond a reasonable doubt.⁵ Because we remand the matter for the trial court to conduct an order to show cause hearing, we need not consider the parties' additional arguments. We also express no opinion on the how the trial court should rule at such a hearing.

⁵ After requesting the full set of trial transcripts from counsel, the appellate record consists of those transcripts, the information, the abstract of judgment, and our prior opinion. At the order to show cause hearing, the trial court's review is not circumscribed by the documents included in the current record, but instead, includes the entire record of conviction and new evidence, if any, proffered by the parties.

DISPOSITION

The order denying Morris's section 1170.95 petition for resentencing is reversed. Upon remand, the trial court shall issue an order to show cause and conduct a hearing in accordance with Penal Code section 1170.95, subdivision (d).

NOT TO BE PUBLISHED.

BENDIX, Acting P. J.

We concur:

CHANEY, J.

SINANIAN, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.